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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 29, 1982

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vs.)

LARRY LEE AGEE,) 2-323
66521

Defendant-Appellant.)

Appeal from Polk District Court - Dale S. Missildine, Judge.

Defendant appeals from his conviction for false use of a financial instrument in violation of Iowa Code § 715.6 (1979). AFFIRMED IN PART AND REMANDED IN PART.

Faith O'Reilly, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Sara Coats, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

Defendant, Larry Lee Agee, appeals from his conviction for false use of a financial instrument in violation of Iowa Code § 715.6 (1979). On appeal he asserts: (1) that certain evidence should have been excluded as irrelevant, immaterial, unduly prejudicial, and without proper foundation; (2) that the evidence was insufficient to support the jury's verdict of guilty; (3) that a mistrial should have been declared when, during voir dire, a prospective juror stated that he did not want to be on the case because he thought the two defendants looked guilty; and (4) that the trial court failed to adequately state its reasons for imposing sentence. We affirm in part and remand in part.

Our scope of review is on assigned errors at law. Iowa R. App. P. 4. However, where there is an issue involving a violation of basic constitutional safeguards, we make an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I.

On October 27, 1979, defendant was a passenger in a car driven by Ronald Smith. They drove to a drive-in bank window where Smith presented a payroll check to the teller. The teller recognized the check as having been reported missing and alerted other bank personnel. The police were summoned, the defendant and Smith were arrested, and both were taken to the police station. En route to the station one officer observed defendant trying to stuff something down in the seat. After the defendant and Smith were charged, the officers returned to the squad car and searched the back seat. They found a stack of payroll checks which had been reported missing. Two of the checks along with other evidence regarding the circumstances of the arrest were admitted into evidence over defendant's objections.

During voir dire a prospective juror stated that he did not want to sit on the

jury because he thought that the defendant looked guilty. The juror was excused but the defendant still moved for mistrial because of the prospective juror's statement. The motion was overruled.

The defendant was found guilty and was convicted. At sentencing the trial court stated that it had taken into consideration the facts surrounding the crime, the defendant's history, and "the maximum sentence allowed by the code." Defendant then instituted this appeal.

II.

Defendant's first contention is that the court erred in admitting into evidence two of the missing checks which had been found in the back seat of the police car. The arresting officers testified that defendant was "squirming around" and "shuffling in the back seat" of the police car. One then testified that it appeared that defendant "was trying to stuff something down in the seat." The officers searched the back seat of the police car and found the stack of missing checks. Two of them were introduced into evidence as exhibits 2 and 3. Defendant objected to the checks and to the testimony regarding their discovery as having "no proper foundation" and as being irrelevant, immaterial, and unduly prejudicial. We find defendant's challenge to be without merit.

Defendant's "no proper foundation" objection was lacking in the required specificity and we find, therefore, that he has failed to preserve error on this issue. The Iowa Supreme Court has consistently required that, to preserve error on improper foundation, the "party objecting to the offer of evidence for this reason must point out in what particular or particulars the foundation is deficient so the adversary may have an opportunity to remedy the alleged defect, if possible." State v. Entsminger, 260 N.W.2d 480, 483 (Iowa 1968). See also U.S. Homes v. Tates, 174 N.W.2d 402, 405 (Iowa 1970); Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 288 (Iowa 1979); City of Cedar Rapids v. Cach, 299 N.W.2d 656, 659 (Iowa 1980).

In addition, we believe the testimony and the checks marked as exhibits 2 and 3 were properly admitted over defendant's objection that they were irrelevant, immaterial and unduly prejudicial. The trial court did not admit the checks into evidence on the grounds that they constituted similar instances of the crime of false use of a financial instrument. They were admitted because the evidence suggested defendant was in possession of the checks and attempted to hide them in the police car. The checks were similar in form and character to the instrument actually used in the commission of the crime charged and were thus relevant to the issues of the defendant's intent and participation as an aider and abettor.

To be relevant, the evidence must have probative value; it must bear a logical relationship to and have a tendency to establish a material proposition. State v. Wilson, 173 N.W.2d 563, 565 (Iowa 1970). The admission of such evidence is a matter within the trial court's discretion. Id. at 566. In the instant case the checks, as part of the circumstances surrounding the commission of the crime, are probative on the issue of defendant's intent. The issue of intent is clearly relevant under Iowa Code § 715.6 (1979) which prohibits the

> . . . use of a financial instrument with the intent to obtain fraudulently anything of value by one who knows that the instrument is not what it purports to be, or who knows that he or she is not the person nor the authorized agent of the person who, as shown on the instrument, has the right to so use the instrument, shall constitute the false use of a financial instrument. (emphasis added)

In Wilson, the defendant was arrested after attempting to cash two stolen payroll checks. Following the arrest, the officers searched the defendant's vehicle and found, among other things, a gun and carbon copies of blank payroll checks. These items were introduced into evidence over defendant's objections that they were irrelevant and improperly admitted. On appeal the Wilson court upheld the introduction into evidence of these items noting that:

> Finally, on the subject at hand, we quote this from 22A C.J.S. Criminal Law section 712c, pages 965, 967-968: ". . . while there is authority to the contrary, even where it is not claimed or proved that it was used in the commission of the crime, a weapon or other instrument found in the possession of accused or his associates when arrested, or at or near the place of arrest, has been held admissible as part of the history of the arrest, and as bearing on the crime, even though it is not clearly shown to be the property of accused. Likewise, a weapon or other instrument found in the possession of accused, but not used in the commission of the crime, has been held admissible to show that accused had carried it in his quest for a victim, although he had used another weapon, to show a design or plan, state of mind, or intent . . . ."

Id.

We believe the court in the instant case did not abuse its discretion in admitting the officers' testimony and the checks marked exhibits 2 and 3 as bearing upon the issue of defendant's intent.

III.

The defendant's next contention is that the court erred in overruling his motion for directed verdict based on insufficiency of the evidence to support the conviction. In State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981), the court articulated the standard of review governing this type of challenge as follows:

> In reviewing a motion for a directed verdict based upon insufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the State. All of the evidence must be considered, State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980), and all legitimate inferences that may be deducted therefrom will be accepted. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. Robinson, 288 N.W.2d at 339.

The theory upon which the State relies is that defendant acted as an aider and abettor and is thus culpable for the crime of the principal, Ronald Smith. See State v. Lott, 255 N.W.2d 105, 107 (Iowa 1977). Under this theory, one can be convicted if "there is substantial evidence to show he assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission." Id. Circumstantial evidence is sufficient to establish guilt. Id." Knowledge is essential, but will not, alone, suffice to prove aiding and abetting. Id. In the instant case we believe there is substantial evidence that defendant aided and abetted Ronald Smith in the crime of false use of a financial instrument. The similar forged payroll checks were found under circumstances inferring that defendant had them in his possession at the time the check was passed to the bank teller and tried to hide them in the seat of the patrol car after he and Smith were apprehended. From the evidence a rational trier of fact could conclude that defendant knew that the checks were forged and was involved in the planning or preparation of the crime, perhaps supplying Smith with the check that he attempted to cash. At the very least the evidence suggests that defendant "lent countenance and approval" to Smith in his attempt to cash the check. Viewing the evidence in the light most favorable to the State and accepting all legitimate inference therefrom, we find there was substantial evidence to support the verdict. Defendant's motion was thus properly overruled.

IV.

Defendant's next contention is that his basic constitutional right to a fair trial by an impartial jury was violated when the court overruled his motion for mistrial based on a statement made by a prospective juror. The court has broad discretion to grant or deny a motion for mistrial and its decision will not be set aside unless there is a clear showing of abuse of discretion. State v. Staker, 220

N.W.2d 613, 617 (Iowa 1974). In Staker, the court articulated the general rule as follows:

> Ordinarily, disqualification of individual jurors for expressions of opinions or for making remarks during selection of the jury indicating in some manner possible prejudice or bias against the accused or the occurrence of circumstances during that procedure from which such bias or prejudice might be implied does not constitute a sufficient ground for a challenge of the entire panel.

Id. (citations omitted). The court indicated that constitutional error would result if "the question of the prospective juror was . . . so prejudicial as to infect the entire panel and deprive defendant of a fair trial." Id. at 617. In Staker the court concluded that in the case of manslaughter arising out of an automobile accident the question posed to a juror on voir dire, if it were true that defendant's license was under suspension at the time of the accident, was not so prejudicial as to infect the entire jury panel and deprive defendant of a fair trial by an impartial jury. In reaching its conclusion, the court reviewed the following relevant authorities:

> In State v. Taylor, 324 S.W.2d 643, 648 (Mo. 1959), no prejudicial error was found in refusing to grant a mistrial motion following a juror's statement she would be ready to give the defendant "the maximum right now" for what he had done.
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> Statements by a prospective juror he had talked about the case with the wife of the person to whom the check had been negotiated were not so prejudicial as to fatally infect the entire panel. No abuse of the trial court's discretion appeared in not declaring a mistrial. State v. Turner, 462 S.W.2d 723, 275 (Mo. 1971).
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> In United States v. Wade, 467 F.2d 1226 (8 Cir. 1972), a prosecution for aggravated bank robbery, a prospective juror spoke out during voir dire saying defendant had shot her son. The remark was evidence of another crime. The juror was immediately excused and the panel admonished to disregard her statements. The trial court's denial of a motion for mistrial was affirmed on appeal because no abuse of discretion was shown.

In the instant case the prospective juror said that he did not want to sit as a juror in this case because he thought the defendants (Agee and Smith) looked guilty. The court admonished the prospective juror of the impropriety of his remarks and reminded the jury panel of the presumption of innocence. The court then excused the prospective juror from further service in the case. We disagree with defendant that the prospective juror's statement was calculated to and did prejudice and irreversibly taint the other members of the jury panel. The statement was no more than an assertion of the prospective juror's opinion as to how the defendant looked; there was no assertion that that defendant actually was or that he believed defendant to be guilty. We believe that, under the authorities cited above, this is not the type of statement which would create prejudice and taint the impartiality of the rest of the jury panel. Accordingly, we find the trial court committed no error in overruling defendant's motion for mistrial.

V.

The State agrees with defendant that the trial court erred by failing to state sufficient reasons on the record for sentencing defendant. The trial court had a range of possible penalties but stated in its written conclusions that the "maximum sentence allowed by the Code" had been considered when sentence was imposed. Accordingly, the court did not comply with Iowa Rule of Criminal Procedure 22(d)(3). See State v. Victor, 310 N.W.2d 201 (Iowa 1981); State v. Pierce, 287 N.W.2d 570 (Iowa 1980); State v. Luedtke, 279 N.W.2d 7 (Iowa 1979). We thus affirm the conviction and remand for resentencing.

AFFIRMED IN PART AND REMANDED IN PART.